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FILED

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**SECRETARY, BOARD OF
OIL, GAS & MINING**

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

**DIVISION'S POST HEARING
MEMORANDUM
REGARDING PETITIONERS' AIR
QUALITY AND CULTURAL
RESOURCE CLAIMS**

Docket No. 2009-019
Cause No. C/025/0005

The Division of Oil, Gas, and Mining (Division), by and through counsel hereby submits the following Memorandum at the Conclusion of the Hearing on the Petitioners' Air Quality and Cultural Resource claims.

BURDEN OF PROOF AND STANDARD OF REVIEW

The Petitioners have the burden of proving that the Division erred in its decision with respect to the permit. (Order Concerning Scope and Standard of Review, 3 (signed Jan. 12,

2010)). Petitioners bear this burden regardless of the order issues are presented in any evidentiary hearing. The Board has indicated it will accord deference to the Division's findings and decisions where substantial technical analysis is involved while otherwise applying a *de novo* standard of review. (*Id.* at 5).

ARGUMENT

I. AIR QUALITY ISSUES

Issue 5. Whether the Division determined that the Fugitive Dust Control Plan for the Coal Hollow Mine met the requirements of the Division prior to approving the mine permit.

Issue 6. Whether the Division of Air quality provided the Division of Oil, Gas and Mining an evaluation of the effectiveness of the Fugitive Dust Control Plan for the Coal Hollow Mine prior to the Division's approval of the mine permit.

Issue 7. Whether the Division of Air quality has provided notice to the Division of Oil, Gas and Mining of receipt of a complete air permit application from ACD for the Coal Hollow Mine.

Issue 8. Whether the Division of Air Quality has provided notice to the Division of Oil, Gas and Mining of approval of an air permit for the Coal Hollow Mine.

Issue 9. Whether the Division was required to wait for the Division of Air Quality's evaluation of the Fugitive Dust Control Plan including the plan's effectiveness in addressing the quality of the night skies before approving the Coal Hollow mine permit.

The Division believes the issues stated by Petitioners related to air quality are redundant and overlapping and therefore the Division will address them together herein. Because Petitioners presented no evidence that the Division's decision related to air quality was erroneous and because the Division and applicant fully complied with the necessary requirements, the

Petitioners have failed to meet their burden of proof and their claims of error should be denied. The applicable regulations are found at Utah Admin. Code r. 645-301-420 *et seq.* Those regulations require the application to “contain a description of coordination and compliance efforts which have been undertaken by the applicant with the Utah Bureau of Air Quality.” (Utah Admin. Code r. 645-301-422). In addition, since the operation is projected to produce more than 1,000,000 tons of coal per year, the application is required to contain an air pollution control plan which includes “A plan for fugitive dust control practices as required under R645-301-244.100 and R645-301- 244.300,” and “an air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under R645-301-423.200 to comply with federal and Utah air quality standards.” (Utah Admin. Code r. 645-304-423, -423.100, and -423.200).

As required by Utah Admin. Code r. 645-301-422, the applicant has described its coordination and compliance with the Utah Division of Air Quality (“DAQ”). The Divisions’ witness Priscilla Burton testified that the application contains a description of coordination and compliance with Utah Division of Air Quality. (Rough Trans. 94:9-24 (Apr. 29, 2010)). The evidence presented also supports this testimony. Exhibit D5, which is Chapter 4 of the Mining and Reclamation Plan (MRP), clearly describes on page 4-10 the coordination and compliance efforts the applicant has undertaken with the DAQ.

The applicant has also complied with Utah Admin. Code r. 645-301-423, -423.100, and 423.200, which require an air pollution control plan for all surface coal mining and reclamation activities with projected production rates exceeding one million tons of coal per year that includes “[a]n air quality monitoring program to provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed under R645-301-423.200 to comply

with federal and Utah air quality standards,” and, “a plan for fugitive dust control practices as required under R645-301-244.100 and R645-301-244.300.” Division witness Priscilla Burton testified that the applicant complied with these regulations by submitting a Fugitive Dust Control Plan. (Rough Trans. 99: 4-25, 100: 1-3 (Apr. 29, 2010)). The Fugitive Dust Control Plan submitted by the applicant to the Division was admitted into evidence as Exhibit D6 and is included in the MRP as Appendix 4-5.

The Division’s witness Priscilla Burton testified that the plan for fugitive dust control practices meets the requirements of Utah Admin. Code r. 645-301-244.100 and -244.300. (Rough Trans. 100: 4-15, 119:19-25, 120:1-25, 121: 1-2 (Apr. 29, 2010)). The applicant’s compliance with these rules is also described in the Division’s Technical Analysis dated October 15, 2010. (Exhibit D8, 86). Petitioners have never alleged that the plan for fugitive dust control practices does not meet the requirements of these regulations.

The Division’s witness Priscilla Burton testified that the application contains an air pollution control plan which includes an air quality monitoring program that will provide sufficient data to evaluate the effectiveness of the fugitive dust control practices proposed and to comply with federal and Utah air quality standards. The Fugitive Dust Control Plan, which is the air pollution control plan, does contain an air quality monitoring program to evaluate the effectiveness of fugitive dust control practices. (Rough Trans. 99:4-25, 100:1-3 (Apr. 29, 2010), and Exhibit D6).

Division witness Priscilla Burton testified that she reviewed the plan, but lacked the technical expertise to evaluate EPA Method 9, which is the specific monitoring program used to evaluate the effectiveness of the fugitive dust control practices described in the Fugitive Dust Control Plan. (Rough Trans. 100:16-23). The Division conducted an investigation into the use of

EPA Method 9, consulting with the applicant, individuals from agencies in Wyoming, and Jon Black from DAQ. (Rough Trans. 100:2-24, 101: 1-25, 102:1-25, 103: 1-9 (Apr. 29, 2010)). In email communication between Priscilla Burton and Jon Black it is noted that EPA Method 9 is used occasionally to monitor fugitive dust of sand and gravel operations. (Exhibit D7).

Petitioners have not presented any evidence to suggest that EPA Method 9 is flawed in any way.

After consideration and investigation, the Division decided to add a permit approval stipulation that the applicant receive approval from the DAQ. (Rough Trans. 108: 9-12 (Apr. 29, 2010)). The relevant stipulation is identified on page 2 of the Technical Analysis dated October 15, 2009 which was admitted into evidence as Exhibit D8. This paragraph states, “The Applicant must receive an Air Quality Approval Order. The information provided in the application may meet the requirements of the Air Quality rules for R645-301-423.200, however, the division does not provide training for permitting staff or inspectors in the application of EPA Method 9. Consequently, it is recommended that the Division request that the Utah DAQ evaluate this fugitive dust control plan prior to issuance of the air quality permit, under the auspices of the MOU to cooperate for the purposes of permitting, signed on September 1, 1999.” (Exhibit D8, 2). If the applicant does not receive an air quality approval order from the Division of Air Quality the mining permit is not valid, and at that point the applicant may be required to revise the Fugitive Dust Control Plan in consultation with DAQ in order to obtain the requisite DAQ approval. As the regulatory authority over air quality in Utah, it is entirely appropriate that DAQ determine whether the monitoring for fugitive dust control practices complies with federal and Utah air quality standards as required by the regulation.

The Petitioners have presented no evidence or legal support for the argument that the Division cannot approve the application for a mining permit that is conditional upon Utah

DAQ's issuance of an air quality approval order. Permit conditions are not unusual. The permit approval contains several other conditions under the heading "Permit Approval Stipulations" in the Technical Analysis dated October 15, 2009. (Exhibit D8, 1-2). The Division properly conditioned the approval of the permit on obtaining an air quality approval order from the Utah Division of Air Quality.

The Petitioners' argument that the Division is required to consider the effect of the permit application, including the Fugitive Dust Control Plan, on the clarity of the night sky was previously dismissed and was improperly argued. The Petitioners presented no new arguments or testimony to justify a reversal of the Board's ruling. (*See* Board's Order Concerning Motion to Dismiss, 3-4 ("The Board agrees that the controlling regulations create no requirement to consider the impact of fugitive dust on night sky clarity.")).

The letters received by the Division with regard to the night sky may be relevant to the National Environmental Policy Act (NEPA) analysis, but are beyond the scope of this proceeding inasmuch as they relate to "night sky" specifically. The Division does not argue that fugitive dust may affect the clarity of the night sky, but the applicable regulations create no duty to specifically consider clarity of the night sky as opposed to air quality generally. The Fugitive Dust Control Plan is the air pollution control plan submitted by the applicant and it is applicable day and night. The Division considered all that it was required to consider with regard to fugitive dust and "night sky" clarity.

The Division notes that coal mining and reclamation activities are required to be conducted in compliance with the Clean Air Act and all other state and federal statutes and regulations containing air quality standards. (Utah Admin. Code r. 645-301-421). The evidence and testimony adduced at the hearing supports the Division's decision. The Petitioners failed to

present any evidence to counter the Divisions' testimony that the Division made the determinations required by the Act and Regulations. The Board should therefore deny Petitioners' claims related to air quality.

II. CULTURAL RESOURCE ISSUES

The Petitioners amended their original Request for Agency Action by setting forth a list of cultural resource issues to be heard. (Petitioners Notice of issues to be Heard, April 19, 2010) The Petitioners objections to the decision to approve the application for the Coal Hollow Mine as they pertain to the requirements to identify and protect cultural resources are limited to these four issues. The Division will address each issue below.

Issue 1. Has the Division made a determination of eligibility and effect related to cultural and historic resources for the entire permit area approved for the Coal Hollow Mine.

There has never been a factual or legal dispute between the Petitioners and the Division over the need for and the adequacy of the cultural resource clearances for the permit area. The Request for Agency Action did not raise this issue.¹ With regard to the permit area, the Petitioners did not allege any failure to survey within the permit area, let alone allege any particular inadequacy in the survey, or omission of a portion of the permit area or any site. The Division and Petitioners both had an understanding that the surveys and Division's clearances had included the entire permit area. When in April 2010, the Petitioners identified their list of issues, they identified necessary parts of the permit decision and listed the statutory obligations

¹ The Petitioners initially challenged the alleged failure to include the Panguitch National Historic District (PNHD) in its identification and protection of historic sites. The Division denied it has a legal obligation to include the PNHD. (Request of Agency Action and Division's Response)

as applied to the permit area, the adjacent area and PNHD. The Petitioners' still did not list or identify any particular error. There is no legal dispute: the Division has never denied that they must complete a clearance for the cultural resources for the permit area. The only question in factual and legal dispute was the extent of the adjacent area. The inclusion of the permit area clearance in the list of issues was a way to begin to isolate where the adjacent area clearance occurred. Since this issue has never been in dispute the only action required of the Board is to confirm the Division's actions taken after the initial permit decision to correct the inadvertent omission of two sites.

The Division concedes that it inadvertently omitted two archeological sites within the permit area from identification and required mitigation, when the permit was approved on October 19, 2009. The Division has fully remedied this error by obtaining the State Historic Preservation Officer's (SHPO) concurrence with the identification and determination of eligibility and effect and by imposing an additional condition to the permit approval that requires ACD to complete SHPO approved mitigation or avoidance of the two archeological sites prior to mining. The Act and regulations expressly allow for such conditions as a way of satisfying the obligation to protect historic sites (Utah Admin. Code r. 645-300-133.600) and allows for mitigation subsequent to issuance of the permit as a means of satisfying the conditions and regulations. (Utah Admin. Code r. 645-301-411.144). Accordingly, the Division has made a determination of eligibility and effect related to cultural and historic resources for the entire permit area approved for the Coal Hollow Mine.

The only issue that remains is for the Board to decide if it needs to take any additional action beyond that taken by the Division. If the Board determines to uphold the permit approval

decision, it can do so with the instruction that the additional condition pertaining to protection of the two additional sites be included. The Division has already made that addition.

Since the error was identified by ACD and corrected by the Division prior to the hearing, and was not specifically alleged, there is no basis to find that the Petitioners have prevailed on this point. It is clear that if there had been a discovery of a new site by ACD after the approval that the actions taken by the Division are exactly what is required to be done in order to comply with the Act. The Division welcomes the Board's review of its subsequent actions after being advised of the omission, and asks that it confirm that the requirements for protecting cultural resources have been fully satisfied.

The evidence presented fully supports this finding.

The Division witness, Daron Haddock testified that on April 20, 2010 the Division was advised by counsel for ACD that the Division had omitted from its identification of cultural resources two surveyed archeological sites located within the permit area. (Rough Trans. 219:21-220:25 (Apr. 29, 2010)). He testified that on April 20, 2010, ACD delivered to the Division a cultural resource survey dated July 10, 2008 for 440 acres of land (Exhibit D19), that had not previously been submitted to the Division. ACD identified two omitted sites located on lands that contain federal coal and private surface lands that were surveyed for archeological sites after the initial survey of the 'privately owned coal' lands. (Rough Trans. 240: 2 –10 (Apr. 29, 2010)). The two omitted sites were not included in the Division's communications to the State Historic Preservation Officer (SHPO) on November 2, 2007 (Exhibit D12) seeking concurrence with the identification of 15 sites; nor in the July 10, 2008 (Exhibit D15) communication seeking concurrence with the proposed mitigation or avoidance for the identified sites.

The Division immediately advised ACD by letter on April 20, 2010 (Exhibit D20) that in order to make the required finding that it had “taken into account” the effect of the permit decision on all eligible historic sites,² that an additional condition³ would be added to the permit decision that will require mitigation or avoidance of the two new sites and SHPO concurrence in the action. (Rough Trans. 245:24-246:22 (Apr. 29, 2010)). On April 21, 2010 the Division sent the SHPO notice of the prior omission of the two sites, delivered the surveys, and requested the SHPO’s concurrence in the determination of eligibility and effect for the two sites (Rough Trans. 243:2-20 (Apr. 29, 2010); Exhibit D21). The SHPO concurred on April 26, 2010. (Rough Trans. 244:15-245:8 (Apr. 29, 2010); Exhibit D22).

In accordance with the additional condition, a mitigation plan will be proposed for the two sites, and the SHPO’s concurrence must be obtained or the two sites must be avoided. (Exhibits D22 and Exhibit D20). Mitigation is permitted to occur after issuance of the permit provided the “required measures are completed before the properties are affected by any mining operation.” (Utah Admin. Code r. 645-301-411.144).

In summary, prior to issuance of the permit the required finding that the Division has taken into account effect of the proposed mining and reclamation operations on all eligible sites within the permit area can be made based on the surveys and the additional condition for mitigation or avoidance of the two recently identified sites. The Board may confirm this finding and uphold the Division’s decision with the new condition. The Decision need not be modified,

² Prior to approval of an application, the Division is required to make a finding that “the Division has taken into account the effect of the proposed permitting action on properties listed on and eligible for listing on the National Register of Historic Places.” (Utah Admin. Code r. 645-300-133.600; and Utah Code § 9-8-404).

³ Utah Admin. Code r. 645-300-133.600 allows the Division to satisfy the required finding by including permit conditions protecting the cultural resources.

but the Division concedes that the record should reflect the additional identifications, concurrence and the new condition.

Issue 2 and 3. Did the Division's determination of eligibility and effect related to cultural resources cover any area outside of the permit area; and did the Division consider a mitigation plan for any cultural or historic properties located wholly outside of the permit area.

The evidence as submitted by the Division's witness clearly demonstrated three uncontroverted facts:

(1) ACD in order to comply with the BLM requirements, surveyed all of the federal coal lands surrounding the permit area, and identified every site within those lands that was considered eligible for listing on the maps included in the surveys (Rough Trans. 179:13-182:9 (Apr. 29, 2010); Exhibit D16, 2 fig. 1 & fig. 2)⁴;

(2) The Division in conjunction with ACD identified the eligible sites that were within or abutting the permit area and made a determination of effect and proposed mitigation that was submitted to the SHPO for concurrence (Rough Trans. 187: 2-16 (Apr. 29, 2010); Exhibit D11, 3 fig. 1); and

(3) For all sites adjoining or partially within the permit area, the SHPO concurred in the proposal to prevent damage to the sites by avoiding them (Rough Trans. 187: 17-190:16 (Apr. 29, 2010), Exhibit D11).

The Petitioners asked Mr. Haddock for identification of "the adjacent area" as if there was an obligation to have a mapped area. The rules do not require a map with the boundary of an 'adjacent area' for cultural resources or any other resource. (*See* Utah Admin. Code r. 645-

⁴ Also, Exhibit D11 (March 10, 2006 Cultural Resource Inventory); Exhibit D17 (January 9, 2008 Cultural Resource Inventory); Exhibit D19 (July 10, 2008 Cultural Resource Inventory).

100 200 and r. 645-301-411.141). Adjacent area is defined as the area where a resource, in the context in which the adjacent area is used, reasonably could be expected to be adversely impacted by coal mining and reclamation operations. (Utah Admin. Code r. 645-100-200 definitions). The suggested need for a delineated or “mapped adjacent area” might make some sense in a context where the type and amount of historic resources is not known. In such cases a boundary or distance might be established based on the possibility of impact to an estimated possible amount of resources, and then investigated and perhaps the boundary could then be revised depending on the result of the investigation. The Division did not have any reason to proceed with such an arbitrary and reiterative approach for the Coal Hollow mine since it knew what sites had been identified and their location relative to the permit boundary. Instead, the Division made the obvious logical determinations regarding the identified sites near the permit boundary in order to investigate the adjacent area.

Daron Haddock testified that the Division made a determination of possible effect and mitigation for those sites adjacent to the mine permit boundary or overlapping the boundary. Some of these sites barely touched the permit boundary and extended from 220 to close to 1000 feet away from the permit boundary (Rough Trans. 187:2-191:1 (Apr. 29, 2010)). He testified that the Division determined that the identified sites could be protected by requiring the operator to avoid the portions of the sites located within the permit boundary, and that the SHPO concurred with this determination. (Rough Trans. 192:10-14 (Apr. 29, 2010); and Rough Trans. 199:22-200: 20 (Apr. 29, 2010)). He testified that for any site further away and fully outside of the permit area⁵ the Division determined that they would also be avoided and there was no

⁵ The permit area must include any lands where there will be surface disturbing activities, and accordingly there can be no surface disturbing activities outside of the permit area. Utah Admin. Code R645-100-200 (2010). See also testimony of Daron haddock, T 203 lines 1 to 12)

reason to consider any of the other sites further away. (Rough Trans. 192: 17 -193:6, 200:21-201:25, 202:1-17 (Apr. 29, 2010)).

Since the definition of the adjacent area is the area where it is reasonable to expect a resource to be adversely impacted by the mining operations, all of the identified sites further away from the permit boundary and that would be avoided are also outside of an “area where it is reasonable to anticipate that they may be adversely impacted by mining operations.” Thus, by logical extension of the results of the initial investigation for the abutting or overlapping sites, and the SHPO’s concurrence in that determination for those sites, it follows that the other sites further distant from the permit boundary are outside of the adjacent area. The Division’s determination of eligibility and effect related to cultural resources did cover areas outside of the permit area; and did the Division did consider the need for a mitigation plan for the cultural or historic properties located outside of the permit area and determined that based on the avoidance of those sites they were not with in the adjacent area and mitigation was not required.

Issue 4. Was the Division required to identify and address the effect of the proposed Coal Hollow Mine on the Panguitch National Historic District before approving the mine permit.

Utah Admin. Code r. 645-301-411.140 requires a narrative describing the nature of cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archeological sites within the permit and adjacent areas. Utah Admin. Code r. 645-100-200 defines adjacent area as “the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation

operations.” Accordingly, an adjacent area for cultural and historic resources is an area where cultural and historic resources could *reasonably* be expected to be adversely impacted by proposed coal mining and reclamation operations.

The testimony at the hearing established that the Panguitch National Historic District is located 35 miles away from the permit area (Rough Trans. 25:6-8 (Apr. 29, 2010)) and is not geographically adjacent to any portion of the permit area. Exhibit D1 (MRP, Vol. 1, 10). Daron Haddock testified that the District was identified in the Cultural Resource Management Plan, (CRMP) (Exhibit D16) that was prepared to coordinate cultural clearance identification for the mine and the BLM’s Lease by Application, NEPA. (Rough Trans. 182:6-183:1; and 206:19-207:9 (Apr. 29, 2010)). The PNHD comprises an area consisting of most of the land within the City of Panguitch and encompasses a variety of buildings, streets, and locations including the main route of US Highway 89. (See Exhibit D16, fig. 3).

Petitioners failed to put on *any* evidence that the cultural or historic resources along the public highway in Panguitch could reasonably be expected to be adversely impacted by the coal mining operations. There were no witnesses presented or evidence presented to support their claim that this is a reasonable expectation: no studies or testimony about the existing amount of traffic, the size of coal trucks, the number of trucks, or if cultural resources are susceptible to injury from coal trucks passing on a public road. The Petitioners have the burden of demonstrating that the Division failed to make a reasonable determination when it concluded that the PNHD was not within an area where it was reasonable to expect adverse effects from mining. The Division is not required to make a finding that any site including the PNHD *is not* in the adjacent area. Mr. Haddock testified that the Division did not believe it was required to list all areas that will *not* be affected. (Rough Trans. 316:24-317:11 (Apr. 30, 2010)).

By comparison the Division provided testimony and evidence to the determination that the PNHD was not in the adjacent area for cultural resource protection for the Coal Hollow Mine. Daron Haddock testified that the Division considered the possibility that coal mining might affect the PNHD that had been identified by the CRMP survey. He testified that he made an evaluation of the need to include the PNHD in the Division's cultural resource evaluation, but subsequently determined that it would not be within an adjacent area for the Coal Hollow mine (See Rough Trans. 211:17-25 (Apr. 29, 2010); 278:9-282:2; and 329: 1-7 (Apr. 30, 2010)). In response, to comments received from the SHPO and members of the public Mr. Haddock and Mr. Helfrich testified that the Division advised the persons and concluded in the final Technical Analysis that it need not include the effects of truck traffic on the PNHD but that effects may be considered as part of the NEPA analysis related to the federal coal lease applications. The Division's testimony is clear that the Division determined that the Coal Hollow Mine permit application did not require that evaluation because "the town of Panguitch is not considered an adjacent area under the . . . rules". (Rough Trans. 214 :12-215:6 (Apr. 29, 2010)).

Mr. Haddock testified that the effects of mining on adjacent areas was considered. (*See* issues 2 and 3, *supra*). He testified that many indirect effects of mining such as fugitive dust and storm water runoff are controlled in a manner by the permit regulation that are intended and would be reasonably be expect to prevent any adverse impact to cultural resources (Rough Trans. 329: 7-17 (Apr. 30, 2010)). Mr. Haddock stated that the final TA concluded that the Division did not regulated truck traffic and could not require trucks to avoid the Town of Alton and so could not consider the effects of truck traffic in Panguitch. He testified that since the Division did not regulate the transport of coal on public highways, the effects from coal trucks was not within the effects of the undertaking that the Division needed to consider when evaluating the

effects of the permit on cultural resources (Rough Trans. 327:7-328:1(Apr. 30, 2010)). The testimony and evidence fully supports the Division's determination that the PNHD was not within the adjacent area. The Petitioners have failed to present any evidence to support a contrary conclusion or to show that the Division's determination was not reasonable.

CONCLUSION

The Division has presented the testimony of its witnesses who have testified to their years of experience and their careful deliberations. Priscilla Burton testified that she carefully evaluated the application and determined that it satisfied the requirements of the air quality regulations. Daron Haddock testified that the Division fully took into account the effect of the Coal Hollow Mine on the cultural resources identified within the permit area, and the adjacent area. The decision to not require a cultural resource clearance for the Panguitch national Historic District was reasonable and appropriate. The Petitioners have failed to demonstrate any legal or factual flaws in any of the Division's actions or determinations.

Respectfully submitted this 12th day of May, 2010



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CERTIFICATE OF MAILING

I hereby certify that I caused a ^{electronic} true and correct copy of the foregoing Request for Agency Action, to be sent by email the 12 day of May, 2010 to:

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